Supreme Court, U.S.
FILED
OCT 31 1980
MICHAEL RODAK, JR., CLERK

No. 80-463

In the Supreme Court of the United States

OCTOBER TERM, 1980

DOMINION TOOL & DIE COMPANY, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the Board abused its discretion in refusing to set aside an election because of the conduct of a few employees who supported the union but who were not union agents.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is not reported. The decision and order of the National Labor Relations Board (Pet. App. 1b-12b) is reported at 235 N.L.R.B. 68. The underlying representation decision (Pet. App. 1c-22d) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 26, 1980. The petition for a writ of certiorari was filed on September 23, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are set forth at Pet. 2-6. Also relevant is Section 8(a)(1), 29 U.S.C. 158(a)(1), which provides:

> It shall be an unfair labor practice for an employer—
>
> to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

STATEMENT

1. The International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW ("the Union") won a representation election among petitioner's employees by a vote of 27 to 23[1] (Pet. App. 1c n.1). Petitioner filed timely objections

[1] There were four challenged ballots. The parties stipulated that one ballot was cast by an ineligible employee. Since the remaining ballots would not have been determinative of the outcome, the challenges were not resolved (Pet. App. 1c n.1).

to the election, contending that certain pro-union employees engaged in conduct which interfered with the free choice of the employees in the election (Pet. App. 2d-5d). A hearing was held and the hearing officer made the following findings and conclusions:

a. Approximately two weeks before the election a group of eight to 16 employees met at a bar following a union meeting. Employee Dan Cedras, a known union proponent, described to those present what he believed would be the employees' wage and job classifications if the Union won the election; employee Stephen Klimek disagreed. Cedras called Klimek some vulgar names and told him he did not know what he was talking about. Another employee, Kenneth Grawburg, told Cedras to "take it easy" with the "loose language" because they were in a public place (Pet. App. 5d-6d; 8d; R. 136-137, 167-169, 259).[2]

The hearing officer concluded that the exchange between Cedras and Klimek was no more than a spirited discussion about union representation by two employees with different ideas on the subject. It was unfortunate that Cedras used profanity, but there was no violence or threat of violence. There was no evidence that either Klimek or any employee who witnessed the incident feared reprisal for not supporting the Union (Pet. App. 12d-13d).

b. Several days before the election a group of six or seven employees remained at the Union's offices after a meeting to have beer and pizza. Cedras, believing that employee David LaRocca had informed the Company that Cedras was the employee who started the Union's

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[2] "R." refers to the appendix filed in the court of appeals.

The first 16 lines of Pet. App. 8d should begin Pet. App. 6d. Compare R. 35-36.

organizing campaign, struck LaRocca on the back of the head and asked why LaRocca had sold him out. LaRocca then asked to speak with Cedras alone, because, according to LaRocca, he felt bad about being accused of selling Cedras out and he wanted to explain. After LaRocca had explained the situation, Cedras apologized for striking LaRocca (Pet. App. 6d-9d; R. 145-146).

The hearing officer found that Cedras had not struck LaRocca because of LaRocca's position regarding the subject of unionization. Cedras was angry because he believed that LaRocca had betrayed him by telling the Company about Cedras's role in the organizing campaign (Pet. App. 9d). LaRocca testified that, at the time of the incident, he was undecided on the subject of unionization and that his feelings on the subject were not commonly known among the employees. Word of the incident spread through the plant, but there was no evidence that employees heard that Cedras had assaulted LaRocca because of his thoughts about the merits of a union. In these circumstances, the hearing officer concluded that the other bargaining unit employees who heard about this incident could not reasonably have concluded that Cedras struck LaRocca because of his anti-union sentiments, or that they should fear reprisal by Cedras because of their union sentiments (Pet. App. 9d-10d).

c. During a discussion of the advantages and disadvantages of union representation with known anti-union employee Paul Lawlor, pro-union employee Joseph O'Guin told Lawlor that when the union got in the "committee" would see to it that Lawlor would not continue working for the Company (R. 129-130). O'Guin did not specify what committee he meant or what power it had to affect Lawlor's job. Moreover, although other employees may have been present in the area during this

conversation, there was no evidence that they heard what O'Guin had said. Lawlor testified that he did not tell any employee what O'Guin had said to him (Pet. App. 10d-11d; R. 129-130).

The hearing officer pointed out that O'Guin had no power to affect Lawlor's job tenure and explained (Pet. App. 13d-14d; citations omitted):

> [W]hen a rank-and-file employee tells another that he will lose his job if he fails to support or vote for the Union, this does not constitute the type of threat of reprisal that establishes an atmosphere of fear and confusion which interferes with the employees' free election choice. The rationale has been that employees are generally capable of evaluating the source as lacking in authority to affect their jobs.

The hearing officer concluded that none of these incidents created an atmosphere of fear and reprisal sufficient to warrant setting aside the election.[3]

Then considering the cumulative impact of the incidents, the hearing officer concluded that there was no basis for setting aside the election (Pet. App. 15d-16d; citations omitted):

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[3]After the results of the election were known, employee Dennis Hoeppner, who had served as the Union's observer at the election, told employee Lawlor, "Go call your lawyer now, your ass is grass and I've got the lawnmower." Hoeppner testified that he had heard prior to the election that Lawlor had said that if the Union won the election he would hire an attorney (Pet. App. 18d; R. 196). The hearing officer concluded that Hoeppner's comment merely meant that Lawlor could hire an attorney to protest the election results but that the Union would win. In any event, since the remark occurred after the balloting was over, it could not have had any effect on the results of the election (Pet. App. 18d-19d).

> In the case herein one employee struck another because he believed the other responsible for betraying his role in the organizational drive to the Employer, the same employee called a third employee some vulgar names for disagreeing with him on the wages and job classifications which would be effective if the Union represented them, and a fourth employee told yet another that he could lose his job if the Union won the election. The [Union] herein did not in any way lead employees to believe that it ratified or acquiesced in such conduct. I cannot conclude that the effect of these incidents, even if known by every other member of the bargaining unit, created an atmosphere among the employees of anxiety, confusion and fear of reprisal for voting against the Union which rendered impossible a rational uncoerced choice as to bargaining representative and affected the results of the election.

2. The Board adopted the findings and conclusions of the hearing officer and certified the Union as the bargaining representative for petitioner's employees (Pet. App. 1c-2c). Petitioner refused to bargain. Based on a charge filed by the Union, the Regional Director issued a complaint against the Company. After the Company filed its answer, General Counsel moved for summary judgment, and the Board granted the motion, finding that petitioner's refusal violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1) (Pet. App 7b). The Board ordered petitioner to bargain with the Union (Pet. App. 9b-10b).

3. The court of appeals enforced the Board's order. The court held that the findings of the hearing officer were "supported by substantial evidence and there were no errors in evidentiary rulings which require further proceedings" (Pet. App. 2a).

ARGUMENT

In evaluating the probable effect of alleged threats, intimidation and coercion upon the outcome of an election, the Board has long held that "conduct of third persons tends to have less effect upon the voters" than similar conduct by employers or unions. *Orleans Mfg. Co.*, 120 N.L.R.B. 630, 633 (1958). Only if the third party conduct is found to have "created an atmosphere rendering a free election impossible" (*id.* at 634) will the election be set aside. As explained in *NLRB* v. *Sauk Valley Mfg. Co.*, 486 F. 2d 1127, 1131 n.5 (9th Cir. 1973):

> This policy credits employees with the ability to give true weight to the possibly impulsive allegations of fellow employees induced by the heat of a campaign. The Board recognizes that because, as a practical matter, unions and employers cannot prevent misdeeds or misstatements by those over whom they have no control, a rule which gives the "same weight to conduct by third persons as to conduct attributable to the parties [would] substantially diminish * * * the possibility of obtaining quick and conclusive election results * * *."[4]

The courts of appeals have uniformly followed the Board's analysis of the appropriate standard for evaluating third party conduct as a basis for setting aside an election. See, *e.g.*, *NLRB* v. *Morgan Health Care Center, Inc.*, 618 F. 2d 127, 129 (1st Cir. 1980); *NLRB* v. *Van Gorp Corp.*, 615 F. 2d 759, 764 (8th Cir. 1980); *NLRB* v. *Miramar of California*, 601 F. 2d 422, 424-425 (9th Cir. 1979); *Methodist Home* v. *NLRB*, 596 F. 2d

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[4]Accord: *Matlock Truck Body & Trailer Corp.* v. *NLRB*, 495 F. 2d 671, 673 (6th Cir.), cert. denied, 419 U.S. 964 (1974); *NLRB* v. *Griffith Oldsmobile, Inc.*, 455 F. 2d 867, 870 (8th Cir. 1972).

1173, 1183 (4th Cir. 1979); *NLRB* v. *Aaron Brothers Corp.*, 563 F. 2d 409, 412 (9th Cir. 1977); *NLRB* v. *Monroe Auto Equipment Co.*, 470 F. 2d 1329, 1332 (5th Cir. 1972), cert. denied, 412 U.S. 928.[5]

The only issue raised in this case, namely, whether the conduct of petitioner's employees was so disruptive or coercive as to require invalidation of the election, does not warrant review by this Court. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491 (1951). Essentially, petitioner quarrels with the fact finding of the Board and the appropriate inferences to be drawn.[6]

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[5]Contrary to petitioner's assertion (Pet. 13-15), there is no conflict among the courts of appeals. As petitioner concedes (Pet. 13-14, 15), the Ninth Circuit, the Eighth Circuit, and the First Circuit apply the standard announced in *Orleans Mfg. Co., supra.* In *NLRB* v. *Urban Telephone Corp.*, 499 F. 2d 239, 242 (7th Cir. 1974), the court recognized the appropriate standard for evaluating third party conduct, but found that the employee's conduct in that case was attributable to the union (*id.* at 244), and therefore applied a less stringent test. Similarly, in *Exeter 1-A Limited Partnership.* v. *NLRB*, 596 F. 2d 1280 (5th Cir. 1979), *NLRB* v. *Mr. Porto, Inc.*, 590 F. 2d 637 (6th Cir. 1978), and *NLRB* v. *Gulf States Canners, Inc.*, 585 F. 2d 757 (5th Cir. 1978), the asserted misconduct was attributable to union representatives.

In *NLRB* v. *Basic Wire Products, Inc.*, 516 F. 2d 261 (6th Cir. 1975), the court held that the Board properly certified a union, without a hearing and over the employer's objections, because conclusory allegations of union misconduct are insufficient to create a material issue of fact.

[6]Petitioner states as an additional question (Pet. i) whether the Board abused its discretion in precluding petitioner from examining certain witnesses concerning their opinion of the general reputation of certain employees. Petitioner does not argue the point beyond asserting that the hearing officer's ruling was "fatally malignant" (Pet. 10). The Board held that "the testimony in question was properly excluded on grounds that it would have unnecessarily prolonged the hearing" and that petitioner "had ample opportunity to present its case and to present relevant and available evidence" (Pet. App. 1c n.2). Petitioner introduced some evidence relating to the reputation

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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and general conduct of the three employees whose conduct and statements formed the basis of petitioner's challenge to the election (R. 96-98, 108-109, 265-267). At the hearing, petitioner's counsel acknowledged that at least some of the excluded evidence was cumulative (R. 109). In any event, petitioner argued that the only purpose of this testimony was to establish that the three employees could have and probably did engage in the conduct alleged in the objections (R. 110-111, 166). Since the hearing officer concluded that each of the employees, Cedras, O'Guin, and Hoeppner, had engaged in the conduct alleged, petitioner suffered no prejudice.

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